

15-0011

cc  
C-15

IN THE CIRCUIT COURT OF LEWIS COUNTY, WEST VIRGINIA LEWIS COUNTY, WV  
FILED

GERALD R. PHILLIPS, and  
TERESA L. PHILLIPS, husband and wife.

2014 APR 10 P 3:43

Plaintiffs.

JOHN B. HINZMAN  
CIRCUIT CLERK

v.

Civil Action No. 11-C-85  
Honorable Kurt Hall

JOSHUA D. STEAR.

Defendant.

TRIAL ORDER

On the 25<sup>th</sup>, 26<sup>th</sup>, and 27<sup>th</sup>, days of March, 2014, came the Plaintiffs, Gerald R. Phillips and Teresa L. Phillips by counsel C. Paul Estep, and came the Defendant, Joshua D. Stear by counsel G. Thomas Smith pursuant to the Court's prior Order setting this matter for a jury trial.

Thereupon, the members of the Venire were voir dired by the Court and by counsel for the parties and all jurors were found to be to be competent to serve as jurors in this matter.

Thereupon, the parties exercised their peremptory strikes, resulting in a panel consisting of Tiffany Casto, Betsy Peeples, Diana Williston, Denver Leshar, James Sumpter, Connie Alfred, and alternates Diane Winsky and James Squires.

Thereupon, the parties gave their opening statements, and Plaintiffs' called as witnesses, Dr. Amy Hebb, Sgt. Shane R. Morgan, Kenneth James, Seth Cogar, Jerry Garrett, Dr. Michael Schwarzenberg, Shauna McNew, MPT, Teresa Phillips, Dr. Greg O'Malley, Joshua Stear, Jerry Phillips, and Dr. Nick Zervos. The deposition of Dr. Nick Zervos of June 5<sup>th</sup>, 2013, was narrated by counsel and law clerk Brian Church. The video deposition of Dr. Zervos dated 2/5/14, was

played for the jury. Plaintiffs' introduced exhibits 2-12, and rested.

At the conclusion of day two of the Trial, juror, Tiffany Casto advised the Court that she had childcare issues and needed to leave early to address the same. The same thing had occurred on day one. Whereupon, the Court questioned juror, Tiffany Casto regarding her childcare issues, as well as her demeanor and inattentiveness of the testimony. Thereupon, the Court inquired of either counsel whether there was any objection to excusing juror Casto and replacing her with alternate, Diane Winsky, to which neither counsel objected and juror Casto was dismissed and alternate juror, Diane Winsky was moved into her place for the remainder of the Trial.

Thereupon, Defendant moved for judgment as a matter of law pursuant to Rule 50, which Motion was denied. Defendant then called Dr. James Pfaeffle and moved into evidence Defendant's exhibits 1A, 1, 2, 3, 5, 6, 7, and 8, and rested.

Thereupon, the Court instructed the jury, counsel for each party made closing arguments and the case was submitted to the jury for deliberations. Alternate juror, James Squires was thanked and discharged.

Thereafter, the jury returned with the following verdict.

**VERDICT FORM**

1. Do you find that the Plaintiff proved by a preponderance of the evidence that defendant Joshua D. Stear was negligent in causing the accident that occurred on December 3, 2010? YES \_\_\_\_\_ NO  X

**If you answered no, please have your foreperson sign the verdict form and notify the bailiff that you have reached a verdict. If you answered "yes" to Question No. 1, proceed to**

following questions.

2. Do you find from a preponderance of the evidence that Gerald R. Phillips was negligent and that said negligence caused or contributed to the accident in this matter?

YES \_\_\_\_\_ NO \_\_\_\_\_

If you answered "yes" to Question No. 2, please state the percentage of liability of each person that caused or contributed to the accident and Plaintiff's injuries.

A. Gerald R. Phillips \_\_\_\_\_ %

B. Joshua D. Stear \_\_\_\_\_ %

C. Total \_\_\_\_\_ 100 %

Note: The combined total fault of both parties must equal 100%.

If you found the Plaintiff to be 50% or more at fault proceed no further other than to have your foreperson sign at the bottom and notify the bailiff that you have reached a verdict in this matter.

If you found the Plaintiff to be less than 50% at fault proceed to assess damages in question Number 3 below.

3. State the amount of damages to which you find, from a preponderance of the evidence, that the Plaintiff is entitled for the following:

A. Past medical bills of Gerald R. Phillips  
from the date of the accident to the present \$ \_\_\_\_\_

B. Non-economic damages, including past

pain, suffering, and mental anguish and loss of enjoyment of life of Gerald R. Phillips from the date of the accident to the present. \$ \_\_\_\_\_

C. Future Medical Bills \$ \_\_\_\_\_

D. Future non-economic damages, including future pain, suffering, and mental anguish and loss of enjoyment of life of Gerald R. Phillips \$ \_\_\_\_\_

E. Lost wages \$ \_\_\_\_\_

Total Award \$ \_\_\_\_\_

4. Do you find that Teresa L. Phillips suffered a loss of consortium with her husband, Gerald R. Phillips, as a proximate result of the automobile accident of December 3, 2010?

Yes \_\_\_\_\_ No \_\_\_\_\_

*If you checked "yes" in response to Question No. 4, proceed to Question No. 5. If you checked "no", have your foreperson sign and date the form and inform the bailiff that you have reached a decision.*

5. What damages do you find that Teresa L. Phillips is entitled to recover for her loss of consortium?

Total Award \$ \_\_\_\_\_

6. Do you find from a preponderance of the evidence, that Joshua Stear acted

intentionally or willfully and wantonly, which caused or contributed to the accident. If so, state the amount of punitive damages to which you find from a preponderance of the evidence that the Plaintiff is entitled. \$ \_\_\_\_\_

Diane M. Williston

Foreperson

3/27/14

Date

Thereupon, the Plaintiff requested that the jury be polled and each juror confirmed their Verdict in this matter. The jury was thanked and discharged.

Thereupon, the Court directed counsel for the Defendant to prepare and submit a "Trial Order" and directed the Plaintiff to file any post trial motions within ten days of entry of said Order.

Thereupon, Court was adjourned.

Each party preserves their objections to the foregoing proceedings.

The Clerk is directed to assess costs against the Plaintiff's and to forward certified copies of this order to counsel of record.

ENTER:

4/10/14

[Signature]  
JUDGE

PREPARED BY:

[Signature]  
G. Thomas Smith

Smith, McMunn & Glover, PLLC  
516 W. Main St.  
Clarksburg, WV 26301  
**Counsel for Defendant, Joshua D. Stear**

APPROVED AS TO FORM BY:



\_\_\_\_\_  
C. Paul Estep  
Estep & Shaffer, L.C.  
212 West Main Street  
Kingwood, WV 26537

**Counsel for Plaintiffs, Gerald R. Phillips and Teresa L. Phillips**

IN THE CIRCUIT COURT OF LEWIS COUNTY, WEST VIRGINIA

GERALD R. PHILLIPS,  
Plaintiff,

v.

JOSHUA C. STEAR,  
Defendant.

Civil Action No. 11-C-85  
Kurt W. Hall, Judge

**ORDER DENYING  
POST-TRIAL MOTIONS**

COMES NOW this Court, in the above-styled matter, to issue ruling on the Plaintiff's Motion for Relief from Judgment and Motion for New Trial.

On March 25<sup>th</sup>, 2014, this matter came on for jury trial before this Court. At the conclusion of the trial, the jury returned a verdict in favor of the Defendant, assigning no liability. It is from this verdict that the Plaintiff seeks relief.

In his Motion for Relief from Judgment, pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure, the Plaintiff claims that the verdict was obtained by fraud committed by the Defendant. Specifically, the Plaintiff accuses the Defendant of fraud by way of allegedly perjuring himself in both his depositional and trial testimony with regard to previous traffic offenses and moving violations. In support of his Motion, the Plaintiff submits copies of convictions for several speeding offenses by the Defendant, as well as an affidavit from the Defendant's ex-wife indicating that the Defendant had been previously cited for speeding on several occasions. The Plaintiff surmises that, if the Defendant was untruthful in his answers to the Plaintiff's questions related to previous traffic offenses, the credibility of his testimony regarding the accident in this case is suspect enough that the judgment should be set aside.

Pursuant to Rule 60(b),

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) *fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party*; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

W. VA. R. CIV. P. 60(b) (emphasis added).

Under W. Va. R. Civ. P. Rule 60(b)(3), a judgment may be set aside for fraud or misrepresentation discovered after entry of judgment. Fraud is defined as anything falsely said or done to the injury of property rights of another. Actual fraud is intentional, and consists of an intentional deception or misrepresentation to "induce another to part with property or to surrender some legal right, and which accomplishes the end designed."

*Gerver v. Benavides*, 207 W. Va. 228, 232, 530 S.E.2d 701, 705 (1999) (quoting *Stanley v. Sewell Coal Co.*, 169 W. Va. 72, 76, 285 S.E.2d 679, 683 (1981)). "We have also made clear the high burden of proof necessary to establish fraud. 'Fraud is never presumed and when alleged it must be established by clear and distinct proof.'" *Gerver*, 207 W. Va. at 232, 530 S.E.2d at 705 (quoting Syl. Pt. 5, *Bennett v. Neff*, 130 W.Va. 121, 42 S.E.2d 793 (1947)).

As it pertains to newly discovered evidence offered to establish fraudulent testimony, "[a] new trial on the basis of newly-discovered evidence will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side." *Gerver*, 207 W. Va. at 233, 530 S.E.2d at 706 (quoting Syl. Pt. 2, in part, *State v. Stewart*, 161 W. Va. 127, 239 S.E.2d 777 (1977)).

In *Gerver*, the Supreme Court of Appeals reversed a circuit court order setting aside a jury verdict in a medical malpractice case. See *Gerver*, 207 W. Va. at 228, 530 S.E.2d at 701. At

trial, the Plaintiff testified as to his inability to perform certain tasks in an effort to establish damages for loss of enjoyment of life and future lost earning capacity. *See id.* at 230, 703. Following the verdict, the Defendants subsequently obtained video surveillance of the Plaintiff performing various yard work and other physical activity. *See id.* In setting aside the verdict, the circuit court noted how central the Plaintiff's testimony was to the establishment of damages and how contradictory the video surveillance appeared. *See id.* at 231, 704. However, on appeal, the Supreme Court reversed the decision of the circuit court and noted that the video surveillance did not directly contradict what the Plaintiff had testified to at trial. *See id.* at 232, 705.

Upon due and mature consideration, the Court finds that the Plaintiff has failed to demonstrate sufficient grounds for relief from the jury verdict. The Court is unconvinced that the recent discovery of the Defendant's prior driving citations demonstrate fraud by clear and distinct proof. The Defendant indicated in his depositions and trial testimony that he was unsure of any speeding tickets on his record since 2006. Even when faced with evidence of a 2011 conviction for speeding, the Defendant indicated that he could not recall the citation. Similar to the issue in *Gerver*, the newly discovered evidence offered to demonstrate fraud by the Plaintiff does not directly contradict his testimony at trial. *See generally id.* An inability to recall does not indicate intentional deception or misrepresentation. The Court finds the Motion insufficient to establish intentional deception or misrepresentation by the Defendant.

Moreover, the alleged misrepresentations of the Plaintiff in the case *sub judice*, compared to those in *Gerver*, were concerning collateral, previous acts that were wholly unrelated to the events giving rise to the case. *See generally id.* The Plaintiff has not presented evidence of fraud related to the merits of the underlying accident itself. Instead, the Plaintiff merely takes issue with the Defendant's answers to impeachment questions, and, therefore the issue is one merely

of the credibility of a single witness.<sup>1</sup> As expressed in *Gerver*, newly discovered evidence should not ordinarily give rise to a new trial when the evidence is solely to impeach or discredit an opposing witness. *See id.* at 233, 706.

Finally, regardless of whether the Defendant was untruthful as to the collateral issue of his previous driving history, sufficient evidence was introduced, from both direct and cross-examination of witnesses other than the Defendant, to support the jury's verdict in favor of the Defendant. Certainly, the jury could have found the Defendant's testimony to have been unreliable but, nonetheless, found other evidence to be in his favor. Testimony at trial produced significantly differing descriptions of the color, make, and model of the vehicle that allegedly caused the accident, varying accounts of whether there were other people in that vehicle, and admissions by the eyewitness that followed the vehicle that she lost sight of it at least once.

THEREFORE, for the foregoing reasons, it is hereby **ORDERED** that the Plaintiff's Motion for Relief from Judgment is **DENIED**.

In his Motion for New Trial, the Plaintiff avers that the jury verdict was against the clear weight of the evidence at trial. Pursuant to Rule 59(a) of the West Virginia Rules of Civil Procedure,

A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law . . . .

W. VA. R. CIV. P. 59(a).

"In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's

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<sup>1</sup> Impeachment of the Defendant's driving record was only permitted following the Defendant having opened the door on the issue. Said impeachment is severely restricted by Rules 404(a)(1), 404(b)(1), 608(b)(1), and 609(a)(2) of the Rules of Evidence, particularly with regard to extrinsic evidence of minor offenses committed by a defendant.

evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.”

Syl. Pt. 6, *Smith v. Cross*, 223 W. Va. 422, 675 S.E.2d 898 (2009) (quoting Syl. Pt. 5, *Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1984)). Furthermore, “[w]hen a case involving conflicting testimony and circumstances has been fairly tried, under proper instructions, the verdict of the jury will not be set aside unless plainly contrary to the evidence or without sufficient evidence to support it.” Syl. Pt. 5, *Smith*, 223 W. Va. at 422, 675 S.E.2d at 898 (citations omitted).

Upon due and mature consideration, the Court finds that the Plaintiff has failed to demonstrate sufficient grounds warranting a new trial. As discussed previously, there was sufficient evidence introduced to support the jury’s finding in favor of the Defendant. Significant questions existed as to the identification of the vehicle that caused the accident underlying this case. Multiple sources of evidence, both from testimony and exhibits, support the jury’s finding in favor of the Defendant. This Court will not disturb a jury verdict merely because of conflicting evidence in the record. The Court presumes the jury resolved any conflicts in the evidence in arriving at its verdict. *See id.* at Syl. Pt. 6.

THEREFORE, for the foregoing reasons, it is hereby **ORDERED** that the Plaintiff’s Motion for New Trial is **DENIED**.

It is further **ORDERED** that the Circuit Clerk of Lewis County mail and/or otherwise provide certified copies of this Order to the parties and attorneys of record.

**ENTERED** this 20<sup>th</sup> day of October, 2014.

  
\_\_\_\_\_  
Kurt W. Hall  
Circuit Court Judge

RECEIVED  
DEC 08 2014  
BY: SMH

STATE OF WEST VIRGINIA, COUNTY OF LEWIS, TO-WIT:  
I, JOHN B. HINZMAN, Clerk of the Circuit Court of Lewis  
County, do hereby certify that the foregoing is a true copy of  
an Order entered in the above styled action on the 20 day  
of October, 20 14.  
Given under my hand and official seal this the 4 day  
of December, 20 14.

**JOHN B. HINZMAN**

Clerk of the Circuit Court of  
Lewis County, West Virginia

*Amyl Simmons, Deputy*

IN THE CIRCUIT COURT OF LEWIS COUNTY, WEST VIRGINIA

GERALD R. PHILLIPS,  
*et ux,*

Plaintiff,

Civil Action No. 11-C-85

v.

JOSHUA STEAR,

Defendant.

cc  
C  
CLERK OF COURT  
LEWIS COUNTY WV  
12/19/2014 11:14 AM

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AGREED ORDER

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WHEREAS, post-trial motions were heard by this Court on June 5, 2014; and

WHEREAS, this Court entered an Order denying post-trial motions on October 20, 2014;

and

WHEREAS, this Court directed the Circuit Clerk to mail and/or otherwise provide certified copies of the Order to the parties and attorneys of record; and

WHEREAS, the parties and their attorneys advised this Court on December 4, 2014 that no certified copies of the Order denying post-trial motions had been received by anyone, and that no party or counsel had knowledge of entry of the Order denying post-trial motions; and

WHEREAS, the Order of October 20, 2014 was a final Order from which an appeal could be prosecuted; and

WHEREAS, the appeal deadline had passed before any party aggrieved by the Order had notice of its entry,

It is therefore **ORDERED** that the Circuit Clerk of Lewis County FORTHWITH furnish certified copies of this Court's October 20, 2014 Order, along with this Order, to all counsel of record by U.S. Mail, and that the entry of this Order shall constitute the final Order of this Court for purposes of appeal to the Supreme Court of Appeals of West Virginia.

Agreed:

Paul Estep by permission  
G. Thomas Smith, Esquire  
WVSB # 4617  
Smith, McMunn & Glover, PLLC  
516 West Main Street  
Clarksburg, WV 26301  
Tel: (304) 326-6000;  
Fax: (304) 329-4000  
*Counsel for Defendant  
State Farm Mutual Automobile  
Insurance Company*

C. Paul Estep  
C. Paul Estep, Esquire  
WVSB # 5731  
Estep & Shaffer, LC  
212 West Main Street  
Kingwood, WV 26537  
Tel: (304) 329-6003  
Fax: (304) 329-6450  
*Counsel for Plaintiff*

Enter: 19th day of December, 2014

James E. Regel  
Judge

ENTERED: \_\_\_\_\_ day of December, 2014

\_\_\_\_\_  
Clerk

By Deputy:

STATE OF WEST VIRGINIA, COUNTY OF LEWIS, TO-WIT:  
I, JOHN B. HINZMAN, Clerk of the Circuit Court of Lewis  
County, do hereby certify that the foregoing is a true copy of  
an Order entered in the above styled action on the 19 day  
of December, 20 14.  
Given under my hand and official seal this the 24 day  
of December, 20 14.

**JOHN B. HINZMAN**  
Clerk of the Circuit Court of  
Lewis County, West Virginia

Christina Swinicki, Deputy